Circuit Court for Montgomery County
Case No. 126585C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3360

September Term, 2018

CHRISTIAN MONGE (A.K.A. VILLATORO)

v.

STATE OF MARYLAND

Kehoe,
Arthur,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kehoe, J.

Filed: April 8, 2020

After a traffic stop, Christian Monge[1], appellant, was arrested and charged with possession with intent to distribute cocaine and conspiracy to commit possession with intent to distribute cocaine. Prior to trial in the Circuit Court for Montgomery County, he filed a motion to suppress the evidence that was seized during the stop, which was denied. A jury ultimately convicted appellant of the possession charge but acquitted him of the conspiracy charge. He was sentenced to a term of imprisonment for six years. In this appeal, appellant presents three questions for our review:

1. Did the suppression court err in denying appellant's motion to suppress?

2. Was the evidence adduced at trial sufficient to sustain appellant's conviction of possession with intent to distribute cocaine?

3. Did the trial court abuse its discretion in refusing to take a partial verdict and in instructing the jury to continue its deliberations after the jury sent a note indicating that it was unable to "come to a consensus" on all of the charges?

For reasons to follow, we hold that the suppression court did not err in denying appellant's motion. We also hold that the evidence was sufficient to sustain appellant's conviction. Finally, we hold that the trial court did not abuse its discretion in instructing the jury. Accordingly, we affirm the judgment of the circuit court.

[1] Appellant is also referred to as "Christian Villatoro" in the record. Just prior to his arrest, appellant identified himself as "Christian Monge," which appears to be his proper name. When the police later ran appellant's name through its various databases, the alias "Christian Villatoro" was discovered.

Background

Appellant was arrested and charged after the police discovered a quantity of cocaine in a vehicle in which he was a passenger. Appellant thereafter filed a motion to suppress.

The Suppression Hearing

At the hearing on appellant's suppression motion, Gaithersburg City Police Officer Larbi Dakkouni testified that, on December 28, 2014, he was on patrol in his vehicle when he observed a vehicle make an illegal left turn. Officer Dakkouni pulled behind the vehicle, turned on his vehicle's emergency equipment, and conducted a traffic stop on the vehicle. In so doing, Officer Dakkouni observed an individual, later identified as appellant, "sitting in the rear middle seat of the vehicle." Officer Dakkouni also observed appellant "reach into his left and his right, as though he was attempting to either retrieve or conceal either a weapon or some CDS." According to Officer Dakkouni, those observations "raised [his] suspicions," in part because he had never been involved in a traffic stop in which "the second passenger" was "sitting by himself in the back."

Officer Dakkouni testified that he then approached the suspect vehicle on foot and spoke to the driver, Luis Ramirez-Alvarenga. Officer Dakkouni observed the driver "constantly looking around," "avoiding eye contact," "mumbling his words," and "sweating." As for appellant, who was still seated in the vehicle's rear seat, Officer Dakkouni observed that he was "looking down towards his feet" and that his hands were "shaking." Officer Dakkouni testified that, in his opinion, the observed behavior meant "either they're hiding something or they're being nervous about looking into the eyes."

Following that initial contact, Officer Dakkouni obtained Mr. Ramirez-Alvarenga's driver's license and registration. Officer Dakkouni also attempted to obtain documentary identification for appellant, but appellant was unable to provide any. Instead, appellant gave the officer his name and birth date. Armed with this information, Officer Dakkouni went back to his patrol vehicle, entered the information into several databases, and discovered that appellant had "priors for possession of concealed weapon and "some CDS charges" and had "several cautions of being armed, dangerous, drug user/seller." Around that time, another officer arrived on the scene to assist.

After discovering that information about appellant, Officer Dakkouni went back to Mr. Ramirez-Alvarenga's vehicle and asked appellant "to step out of the vehicle, just to make sure he [did not] have any weapons on him." Appellant complied, and the two walked to the front of the vehicle, where Officer Dakkouni engaged appellant in a conversation. Officer Dakkouni testified that, during the conversation, "I ask[ed] him for consent. I ask[e]d him if he had any weapons on him. I believe he said no. I ask[ed] him for consent to search his person, [to] which he said yes." Officer Dakkouni then searched appellant's person and found approximately $400 cash in appellant's pocket.

Officer Dakkouni testified that, at that point, he decided "to conclude the traffic stop" and issue a warning for the driver, Mr. Ramirez-Alvarenga, for failing to obey a traffic control device. After going back to his patrol vehicle and completing a written warning, Officer Dakkouni walked back to the driver's side of Mr. Ramirez-Alvarenga's vehicle and asked him to "step out." Mr. Ramirez-Alvarenga complied, and Officer Dakkouni

told him that he "was just giving him a warning for running the red light." Officer Dakkouni then gave Mr. Ramirez-Alvarenga the written warning and told him that "he was free to leave."

As Mr. Ramirez-Alvarenga was walking back to his car, Officer Dakkouni said, "hey," at which point Mr. Ramirez-Alvarenga "turned around [and] started walking" towards the officer. Officer Dakkouni asked Mr. Ramirez-Alvarenga "if he had anything illegal in the car, any weapons." Mr. Ramirez-Alvarenga responded, "No." Officer Dakkouni then asked Mr. Ramirez-Alvarenga if appellant "maybe concealed anything in the car that he [wanted the officer] to look at now[.]" Mr. Ramirez-Alvarenga responded, "Yeah, go ahead." A search of the vehicle ensued, and several baggies of cocaine were discovered in the back pouch compartment of one of the vehicle's seats. Both appellant and Mr. Ramirez-Alvarenga were arrested. A search of Mr. Ramirez-Alvarenga's person also revealed an amount of cocaine secreted inside his wallet.

In addition to Officer Dakkouni's testimony, a video of the traffic stop was admitted into evidence. That video had been captured by a camera mounted on the dashboard of Officer Dakkouni's patrol vehicle.

At the conclusion of the evidence, defense counsel argued that, when Officer Dakkouni asked appellant to step out of the vehicle, the officer did not have the requisite reasonable articulable suspicion to detain appellant for further investigation. Defense counsel also argued that appellant's consent to search his person was involuntary and that, even if voluntary, the subsequent search exceeded the scope of the consent. Defense

counsel argued, therefore, that the money found on appellant's person should be suppressed. Defense counsel further argued that, because the search of Mr. Ramirez-Alvarenga's vehicle would not have occurred if not for the money found on appellant's person, the evidence found in the vehicle, namely, the cocaine, should be suppressed as "fruit of the poisonous tree."

In the end, the suppression court denied appellant's motion to suppress. The court found that the evidence, and in particular the video of the stop from Officer Dakkouni's dashboard camera, established that appellant's consent to search his person was voluntary, as there was "absolutely no evidence" that appellant's will had been overborne or that his ability to consent had been impaired. The court also found that appellant did not have standing to challenge the search of Mr. Ramirez-Alvarenga's vehicle.

The Trial Evidence

Appellant and Mr. Ramirez-Alvarenga were each charged with one count of possession of cocaine with intent to distribute and one count of conspiracy to commit possession of cocaine with intent to distribute. The two were tried jointly on those charges.

At that trial, Officer Dakkouni testified to the circumstances of the traffic stop, explaining that, in effectuating the stop of Mr. Ramirez-Alvarenga's vehicle, he observed appellant "sitting in the middle seat in the back" and "reaching to his left and then to his right as though he was going to retrieve or hide some sort of either weapon or CDS." Officer Dakkouni testified that he ultimately searched appellant's person, revealing

$431.00 in U.S. currency. Officer Dakkouni further testified that, shortly thereafter, another police officer arrived on the scene and searched Mr. Ramirez-Alvarenga's vehicle, discovering "seven individual baggies containing a white substance" and 49 "empty baggies" that were the same color as the bags containing the white substance. The search also revealed a "forged Maryland identification card" with appellant's picture and a false name. Officer Dakkouni testified that "all the drugs" had been found in a pouch attached to the back of one of the vehicle's seats, which was located to the right of where appellant had been sitting. Officer Dakkouni explained that the pouch was "there on the seat to stow things that anybody that's driving the vehicle or sitting in the vehicle wants to stow there."

Gaithersburg Police Officer Justin Compton testified that he was the officer that performed the search of Mr. Ramirez-Alvarenga's vehicle. Officer Compton testified that, in conducting that search, he discovered "seven baggies of a white powdery substance" and "49 clear glassine baggies" in the "map pocket" on the back of one of the vehicle's seats. Officer Compton testified that he also found the identification card with appellant's picture "in the exact same location" as the bags, "right next to each other."

Leah King, an expert in forensic chemistry, testified that she received and analyzed the white powdery substance found inside Mr. Ramirez-Alvarenga's vehicle. Ms. King testified that the substance found inside each of the seven bags tested positive for cocaine. Montgomery County Police Sergeant Jason Cokinos, an expert in drug

investigation and identification, testified that, in his opinion, the cocaine found inside Mr. Ramirez-Alvarenga's car had been possessed "with the intent to distribute them."

The Jury Deliberations

On the second day of trial, prior to breaking for lunch, the jury retired to deliberate. Approximately six hours later, the jury submitted a note indicating that it was "at a consensus on two charges but not on two others. May we be excused for the evening?" The trial court, after noting that it was "going to send them home at 5 o'clock anyway," excused the jurors and told them to report back at 9:30 a.m. the following day.

The next day, the jurors returned to court. Before excusing the jury so that it could resume its deliberations, the trial court informed the jurors that it would "check" on them during deliberations and that, if they were "still working at about 12:25," the court would "see what's up." The court added that "hopefully" the jurors would "be able to figure something out prior to then but there's no rush, take your time." The jury then retired to deliberate.

Approximately 50 minutes later, the jury submitted the following note: "We have come to a consensus on 2 counts. On the other 2, we have discussed the counts extensively and taken 5 votes. We are almost evenly split and people are firm in their opinion. How do we move forward?" After sharing the note with the parties, the trial court stated that it was somewhat confused as to the jury's position given that, in the court's opinion, it was "an all or nothing case." The court then stated that, although it could "take a partial verdict," it was inclined "simply to send a note back in and ask

them, please continue the deliberations." After defense counsel objected and requested a partial verdict, the court decided to "send them a note, please continue to deliberate, and see what they say." The court added that it would "maybe check back with them in an hour or so."

Approximately one hour after the trial court sent its note telling the jurors to "please continue to deliberate," the jury returned a verdict on all counts. As to appellant, the jury found him guilty of possession with intent to distribute cocaine but not guilty of conspiracy to commit possession with intent to distribute cocaine. As to Mr. Ramirez-Alvarenga, the jury found him guilty of possession with intent to distribute cocaine but not guilty of conspiracy to commit possession with intent to distribute cocaine.

Analysis

1.

Appellant first contends that the suppression court erred in denying his motion to suppress the money found on his person and the cocaine found in Mr. Ramirez-Alvarenga's vehicle. Appellant argues that the police did not have "reasonable articulable suspicion to detain [him] for purposes of conducting a drug investigation" and that, as a result, any consent he gave to search his person was involuntary. Appellant also argues that, even if his detention was justified, his consent was nevertheless involuntary because the record "demonstrates only acquiescence in the request to search" and "shows nothing more than a milieu of overt police domination, such that no reasonable person would feel free to ignore [Officer] Dakkouni's request to search." Further, appellant asserts that

Officer Dakkouni's search was unreasonable because it "exceeded the scope of any putative consent," as "a reasonable person would have understood by the exchange between appellant and [Officer] Dakkouni" constituted consent to a search "only for weapons." For those reasons, appellant maintains that the court erred in denying his motion to suppress the money found on his person. As to the court's denial of his motion to suppress the cocaine, appellant asserts that the court erred in finding that he did not have standing to challenge the search of Mr. Ramirez-Alvarenga's vehicle.

"In reviewing the denial of a motion to suppress evidence under the Fourth Amendment, we look only to the record of the suppression hearing and do not consider any evidence adduced at trial." *Daniels v. State,* 172 Md. App. 75, 87 (2006). In so doing, "we view the evidence presented at the [suppression] hearing, along with any reasonable inferences drawable therefrom, in a light most favorable to the prevailing party." *Davis v. State,* 426 Md. 211, 219 (2012). "We accept the trial court's factual findings unless they are clearly erroneous, but we review *de novo* the court's application of the law to its findings of fact." *Pacheco v. State,* 465 Md. 311, 319 (2019) (citations and quotations omitted). "When a party raises a constitutional challenge to a search or seizure, this Court renders an independent constitutional evaluation by reviewing the relevant law and applying it to the unique facts and circumstances of the case." *Id.* at 319-20 (citations and quotations omitted).

Appellant was lawfully detained when he consented to the search

"The Fourth Amendment protects against unreasonable searches and seizures, including seizures that involve only a brief detention." *Ferris v. State*, 355 Md. 356, 369 (1999). "The Supreme Court has made clear that a traffic stop involving a motorist is a detention which implicates the Fourth Amendment." *Id.* A traffic stop, however, "does not initially violate the federal Constitution if the police have probable cause to believe that the driver has committed a traffic violation." *Id.*

Moreover, in effectuating a legitimate traffic stop, "an officer's mission includes ordinary inquiries incident to the traffic stop." *Rodriguez v. United States*, 575 U.S. 348, 355 (2015) (citations and quotations omitted). "Typically such inquiries involve checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." *Id.* During a traffic stop, an officer may also "attend to related safety concerns[.]" *Id.* at 354. "Traffic stops are especially fraught with danger to police officers, so an officer may need to take certain negligibly burdensome precautions in order to complete his mission safely." *Id.* at 356 (citations and quotations omitted). Such "de minimis" intrusions include "requiring a driver, already lawfully stopped, to exit the vehicle." *Arizona v. Johnson*, 555 U.S. 323, 331 (2009). The officer may also order any passengers to exit the vehicle, as "the same weighty interest in officer safety is present regardless of whether the occupant of the stopped car is a driver or passenger." *Maryland v. Wilson*, 519 U.S. 408, 413 (1997).

Even "inquiries into matters unrelated to the justification for the traffic stop … do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop." *Johnson*, 555 U.S. at 333. Although the reasons for the traffic stop "may not be conveniently or cynically forgotten and not taken up again until after an intervening [investigation] has been complete," the Fourth Amendment does not bar an officer from pursuing "two purposes essentially simultaneously, with each pursuit necessarily slowing down the other to some modest extent." *Charity v. State*, 132 Md. App. 598, 614-15 (2000). In short, "[t]here is no support in Fourth Amendment jurisprudence for the notion that questioning unrelated to the purpose of the traffic stop requires reasonable suspicion, provided that the questioning occurs within the timeframe reasonably necessary to effectuate the traffic stop." *Santos v. State*, 230 Md. App. 487, 503 (2016) (quoting *United States v. Mason*, 628 F.3d 123, 131 (4th Cir. 2010)).

In the present case, appellant does not contest the legitimacy of the initial traffic stop. Rather, appellant asserts that Officer Dakkouni "did not have reasonable articulable suspicion to detain [him] for purposes of conducting a drug investigation."

Appellant's argument fails in several respects. First, the evidence adduced at the suppression hearing makes plain that Officer Dakkouni did not unnecessarily delay in working through the traffic stop, which included running checks on the vehicle's occupants and issuing a written warning to Mr. Ramirez-Alvarenga. There is no indication that Officer Dakkouni's simultaneous investigation of appellant, in which he

asked appellant to step out of the vehicle and requested consent for a search, had any measurable effect on the officer's reasonable pursuit of the traffic stop's mission. Accordingly, appellant's detention was lawful up until the point at which the traffic stop was concluded, that is, up until Mr. Ramirez-Alvarenga was issued his written warning, which did not occur until after appellant had given his consent.

Even if appellant's continued detention was not justified by Officer Dakkouni's traffic stop, it certainly was justified by the officer's reasonable, articulable suspicion that appellant was involved in criminal activity. "The caselaw universally recognizes the possibility that by the time a legitimate detention for a traffic stop has come to an end, or more frequently while the legitimate traffic stop is still in progress, justification may develop for a second and independent detention." *State v. Ofori*, 170 Md. App. 211, 245 (2006). Under such circumstances, a police officer may briefly detain an individual for investigatory purposes "without violating the Fourth Amendment as long as the officer has a reasonable, articulable suspicion of criminal activity."[2] *Swift v. State*, 393 Md. 139, 150 (2006).

"The concept of reasonable suspicion, like probable cause, is not 'readily, or even usefully, reduced to a neat set of legal rules.'" *United States v. Sokolow*, 490 U.S. 1, 7 (1989). (citations omitted). Instead, it is "a common sense, nontechnical conception that considers factual and practical aspects of daily life and how reasonable and prudent

[2] Sometimes referred to as a "Terry stop," a reference to the landmark Supreme Court case of *Terry v. Ohio*, 392 U.S. 1 (1968).

people act." *Cartnail v. State*, 359 Md. 272, 286 (2000). Moreover, we must "assess the evidence through the prism of an experienced law enforcement officer, and 'give due deference to the training and experience of the…officer who engaged the stop at issue.'" *Holt v. State*, 435 Md. 443, 461 (2013) (citations omitted). Although a detaining officer must be able to justify an investigatory stop with something more than an unparticularized suspicion or "hunch," the legality of the stop does not hinge upon any one factor or set of factors; instead, the legality of the stop should be assessed based on the "totality of the circumstances." *Alabama v. White*, 496 U.S. 325, 330 (1990).

Here, the totality of the circumstances supported a reasonable, articulable suspicion that appellant was involved in criminal activity. Officer Dakkouni testified that, when he initially conducted the traffic stop, he observed appellant, who was sitting by himself in the back of the vehicle, "reach into his left and his right, as though he was attempting to either retrieve or conceal either a weapon or some CDS." Then, upon making contact with appellant, Officer Dakkouni observed that appellant's hands were "shaking" and that he was "looking down towards his feet" as if he was "hiding something." *See Chase v. State*, 224 Md. App. 631, 645 (2015) (noting that "nervous and evasive behavior can be a pertinent factor in determining reasonable suspicion"). Finally, after inputting appellant's information into his vehicle's computer, Officer Dakkouni discovered that appellant had "priors for possession of concealed weapon and "some CDS charges" and had "several cautions of being armed, dangerous, drug user/seller." Based on those facts, we conclude that appellant was lawfully detained when he consented to the search of his person.

Appellant's consent to search was voluntary and unequivocal

We also hold that appellant's consent was otherwise voluntary and that the subsequent search of appellant's person did not exceed the scope of his consent. "A search . . . does not violate the Fourth Amendment if a person consents to it." *Varriale v. State*, 218 Md. App. 47, 53 (2014), *aff'd* 444 Md. 400. "For a consensual search to satisfy the Fourth Amendment, the consent must be voluntary, *i.e.*, free from coercion." *Varriale v. State*, 444 Md. 400, 412 (2015). Valid consent may be oral. *Frobouck v. State*, 212 Md. App. 262, 279 (2013). "The burden of proving voluntariness lies with the State and depends upon the totality of the circumstances." *Bellard v. State*, 229 Md. App. 312, 349 (2016), *aff'd* 452 Md. 467.

As for its scope, "a consensual search may go no further than the limits defined by the consent." *Varriale*, 444 Md. at 412 (citations and quotations omitted). "The standard for measuring the scope of a person's consent under the Fourth Amendment is that of objective reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the person giving consent?" *Redmond v. State*, 213 Md. App. 163, 186 (2013) (citations and quotations omitted). "The objective reasonableness determination is a question of law, but factual circumstances are highly relevant when determining what the reasonable person would have believed to be the outer bounds of the consent that was given." *Id.* at 186-87 (cleaned up).

Here, the totality of the circumstances establish that appellant's consent was free from coercion. As the suppression court found, there was absolutely no evidence that

appellant's will had been overborn or that his ability to consent had been impaired. Aside from certain circumstances common in just about every traffic stop (*e.g.*,. uniformed police officers, flashing lights), nothing about the encounter could reasonably be construed, either by itself or in conjunction with the other circumstances, as coercive. To hold otherwise would render as involuntary virtually every consent to search given during a traffic stop.

Moreover, the record shows that Officer Dakkouni, while lawfully effectuating an otherwise unremarkable traffic stop, merely asked appellant to step out of the vehicle and then asked him, quite simply, if he could "search his person." Without any further provocation or prodding, appellant affirmatively stated, "Yes."[3] Again, at no point during the entire encounter did Officer Dakkouni do anything that would have caused a reasonable person in appellant's position to feel coerced into affirmatively consenting to the search. Thus, appellant's claim that he "acquiesced" or "submitted" to the search is not supported by the record, as is his claim of "overt police domination." Accordingly, we cannot say that the suppression court erred in finding that appellant's consent was voluntary.[4]

[3] That Officer Dakkouni did not tell appellant he could refuse the request is of little moment, as the United States Supreme Court "has 'rejected in specific terms the suggestion that police officers must always inform citizens of their right to refuse when seeking permission to conduct a warrantless search.'" *Fields v. State*, 203 Md. App. 132, 151 (2012) (quoting *United States v. Drayton*, 536 U.S. 194, 206 (2002)).

[4] Appellant contends that the evidence at the suppression hearing "demonstrates only acquiescence" on his part and "does not indicate . . . affirmative, voluntary consent" to the search of his person. But the suppression court found that the search was consensual,

Finally, we are not persuaded that the subsequent search of appellant's person exceeded the scope of his consent. Officer Dakkouni asked if he could search appellant's "person," and appellant agreed. Officer Dakkouni did not qualify his request in terms of where he would be searching or what he would be searching for, and appellant did not qualify his consent in such terms, either. Thus, the search of appellant's pocket, which resulted in the discovery of the cash, was reasonable.

Appellant did not have standing to challenge the search of the vehicle

We hold that appellant did not have standing to challenge the search of Mr. Ramirez-Alvarenga's vehicle and, even if he did, his "fruit of the poisonous tree" argument is without merit. "Fourth Amendment rights are personal in nature and may only be enforced by the person whose rights were infringed upon." *Jones v. State*, 407 Md. 33, 49-50 (2008). "The proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure." *State v. Savage*, 170 Md. App. 149, 175 (2006) (quoting *Rakas v. Illinois*, 439 U.S. 128, 130 n.1 (1978)).

Here, appellant failed to establish that his Fourth Amendment rights were violated by the search, as he set forth no evidence showing that he had a legitimate expectation of privacy in Mr. Ramirez-Alvarenga's vehicle. *See Rakas*, 439 U.S. at 148-50 (holding that

and the evidence, specifically Officer Dakkouni's testimony and the dashboard camera footage, fully supports that conclusion. Appellant's reliance on *Graham v. State*, 146 Md. App. 327, 368–70 (2002), is misplaced. In that case, the officer did not ask for permission before patting down the defendant. *Id.* at 369.

defendants did not have standing to challenge the search of a vehicle in which the defendants, who were passengers in the vehicle at the time of the search, had no ownership interest in the property seized and no legitimate expectation of privacy in the area searched); s*ee also Laney v. State*, 379 Md. 522, 545 (2004) ("The Fourth Amendment guarantees do not apply [] unless the individual maintained a legitimate expectation of privacy in the houses, papers, and effects searched or seized."). Accordingly, the suppression court did not err in finding that appellant lacked standing to challenge the search of the vehicle.

Appellant argues that he did have standing to challenge the search as "fruit of the poisonous tree" because the money found on his person, which was the result of an "unlawful" search, directly led to the search of the vehicle. We disagree. First, as noted, the search of appellant's person was not unlawful. *See Thornton v. State*, 465 Md. 122, 150 (2019) ("[The exclusionary rule's] application prohibits the admission of evidence found as a direct result of *unconstitutional* conduct in addition to what is known as 'fruit of the poisonous tree,' meaning any evidence 'discovered and found to be derivative of an *illegality*.'") (citations omitted) (emphasis added). Moreover, even if the search of appellant's person was unlawful, the search of the vehicle was not the product of that illegality, as Officer Dakkouni did not search Mr. Ramirez-Alvarenga's vehicle because he found money on appellant's person. *See, generally*, *Savage*, 170 Md. App. at 203 ("Before evidence may be excluded, it must be shown that the evidence was, in fact, the product of the Fourth Amendment violation in issue, not simply that it was recovered

after the violation."). Officer Dakkouni testified that, after he found the money on appellant's person, he was prepared to let both men go and simply issue a written warning to Mr. Ramirez-Alvarenga regarding the traffic violation. It was not until Officer Dakkouni asked for and received Mr. Ramirez-Alvarenga's consent that the search was conducted. As such, the alleged unlawfulness of the search of appellant is no basis to exclude the drugs found in the vehicle. *Id.* at 205 ("When the evidence in issue may follow the violation but is not the product of the violation, there is no conceivable justification for paying the high social cost of excluding it.").

2.

Appellant next claims that the evidence adduced at trial was insufficient to sustain his conviction of possession with intent to distribute cocaine. Specifically, appellant argues that the evidence did not establish that he was in possession of the cocaine found in Mr. Ramirez-Alvarenga's vehicle. Appellant contends, rather, that the evidence merely established that he was in close proximity to the drugs, which is insufficient to support a finding of possession. In support, appellant notes that no drugs were found on his person and that he had no ownership interest in the vehicle. Appellant further notes that the evidence was "unclear as to whether the identification card was in the same car compartment as the drugs."

The appellate test for evidentiary sufficiency is whether, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Donati v. State*, 215 Md.

App. 686, 718 (2014) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979 (emphasis in *Jackson*). That standard applies to all criminal cases, "including those resting upon circumstantial evidence, since, generally, proof of guilt based in whole or in part on circumstantial evidence is no different from proof of guilt based on direct eye-witnesses accounts." *Neal v. State*, 191 Md. App. 297, 314 (2010). Moreover, "[t]he test is 'not whether the evidence *should have or probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder.'" *Painter v. State*, 157 Md. App. 1, 11 (2004) (citations omitted) (emphasis in original). In deciding this question appellate courts "'must give deference to all reasonable inferences [that] the fact-finder draws, regardless of whether [we] would have chosen a different reasonable inference.'" *Donati*, 215 Md. App. at 718 (quoting *Cox v. State*, 421 Md. 630, 657 (2011)). In so doing, we "defer to the fact finder's opportunity to assess the credibility of witnesses, weigh the evidence, and resolve conflicts in the evidence." *Neal*, 191 Md. App. at 314 (cleaned up).

"To possess something is 'to exercise actual or constructive dominion or control' over it." *Nicholson v. State*, 239 Md. App. 228, 252 (2018) (citing Md. Code, Crim. Law § 5-101(v)), *cert. denied* 462 Md. 576. Thus, "in order to support a conviction for a possessory offense, the evidence must show directly or support a rational inference that the accused did in fact exercise some dominion or control over the prohibited [item.]" *Jefferson v. State*, 194 Md. App. 190, 214 (2010) (citations and quotations omitted). "'Control' is defined as 'the exercise of a restraining or directing influence over the thing

allegedly possessed.'" *Williams v. State*, 231 Md. App. 156, 200 (2016) (citations omitted).

With that said, "[c]ontraband need not be on a defendant's person to establish possession." *Handy v. State*, 175 Md. App. 538, 563 (2007). "Rather, a person may have actual or constructive possession of the [contraband], and the possession may be either exclusive or joint in nature." *Moye v. State*, 369 Md. 2, 14 (2002). When considering whether the evidence is sufficient to establish joint and/or constructive possession, we generally look at the following factors: 1) the proximity between the defendant and the contraband; 2) whether the contraband was within the view or knowledge of the defendant; 3) whether the defendant had ownership of or some possessory right in where the contraband was found; and 4) whether a reasonable inference can be drawn that the defendant was participating in the mutual use and enjoyment of the contraband. *Cerrato-Molina v. State*, 223 Md. App. 329, 335 (2015) (citing *Folk v. State*, 11 Md. App. 508, 518 (1971)). We also consider the nature of the premises where the contraband is found and whether there are circumstances indicating a common criminal enterprise. *Nicholson*, 239 Md. App. at 253. Nevertheless, possession is not determined by any one factor or set of factors, but rather "by examining the facts and circumstances of each case." *Smith v. State*, 415 Md. 174, 198 (2010).

We hold that the evidence adduced at trial was sufficient to permit a reasonable inference that appellant both knew about the cocaine and that he exercised some dominion or control over it. The cocaine was found in a pouch on the back of one of the

vehicle's seats, which was located within easy reach of where appellant was sitting. Officer Dakkouni testified that, prior to the discovery of the drugs, he observed appellant reaching in the direction of where the cocaine was hidden. Officer Dakkouni also testified that, at the time, it appeared as if appellant "was going to retrieve or hide some sort of either weapon or CDS." An identification card with appellant's picture was found in close proximity to the drugs, and over $400 in cash was found on appellant's person.[5] In short, this was not, as appellant suggests, a "mere proximity" and "mere presence" case in which the factfinder was required to speculate as to whether appellant possessed the drugs. *Cf. Taylor v. State*, 346 Md. 452, 459, 463 (1997) (finding evidence of marijuana possession insufficient where the defendant was merely present in a hotel room in which marijuana had been smoked and where the marijuana had been secreted in someone else's personal carrying bags, which were not shown to be within the defendant's control); *Moye v. State*, 369 Md. 2, 17-20 (2002) (finding evidence of drug possession insufficient where the drugs were found in a home in which the defendant had been temporarily staying and where no evidence was presented establishing either the

[5] As noted, appellant argues that the evidence was "unclear" as to the location of the identification card. In making that claim, appellant cites Officer Compton's testimony on cross-examination that "he was not certain that he did not find the identification card in a cupholder and not in the same location as the baggies." But, as appellant admits, Officer Compton also testified on cross-examination that the identification card "was found in proximity to the other items." That testimony, coupled with Officer Compton's direct testimony that the identification card was found "in the exact same location" as the drugs, supported a reasonable inference that the identification card and the drugs were found in close proximity to one another. *See State v. Smith*, 374 Md. 527, 539 (2003) (An inference "need only be reasonable and possible; it need not be necessary or inescapable.").

defendant's proximity to the drugs or his presence in the area of the home where the drugs were found). Accordingly, the evidence was sufficient to sustain appellant's conviction.

3.

Appellant's final argument is that the trial court erred when it refused to take a partial verdict, but instead instructed the jury to continue its deliberations, after the jury informed the court that it had "come to a consensus on two counts" but was "evenly split" on the other two counts. Appellant maintains that, when the jury issued that note, the jurors had been deliberating for approximately seven hours and had previously issued a similar note, in which the jurors had informed the court that they were unable to reach a consensus on two of the counts. Appellant contends that, given the brevity of the trial and the lack of complexity of the case, requiring the jury to continue its deliberations "was not a reasonable option" under the circumstances. Appellant maintains, therefore, that the trial court abused its discretion in refusing to take a partial verdict and in instructing the jury to continue deliberations.

"The decision to declare a mistrial is an exercise of the trial judge's discretion and is entitled to great deference by a reviewing court." *State v. Fennell*, 431 Md. 500, 516 (2013). "A genuinely deadlocked jury is considered the prototypical example of a manifest necessity for a mistrial." *Fennell*, 431 Md. at 516. "The term 'genuinely deadlocked' suggests, however, 'more than an impasse; it invokes a moment where, if deliberations were to continue, there exists a significant risk that a verdict may result

from pressures inherent in the situation rather than the considered judgment of all the jurors.'" *Id.* at 516-17 (citing *United States v. Razmilovic*, 507 F.3d 130, 137 (2nd Cir. 2007)).

"[T]he determination of whether there is manifest necessity for a mistrial … is a fact-specific inquiry not reducible to 'a standard that can be applied mechanically or without attention to the particular problem confronting the trial judge.'" *Id.* at 517 (citing *Arizona v. Washington*, 434 U.S. 497, 505-06 (1978)). "In the context of a hung jury, . . . the trial court must determine ordinarily that genuine jury deadlock exists, such that further deliberations are unlikely to be productive." *Id.* at 519-20. "[T]he determination to have a jury continue deliberating or to declare a mistrial is a matter largely within a trial judge's discretion." *Holmes v. State*, 209 Md. App. 427, 449 (2013).

When, as is the case here, a jury indicates that it has reached an agreement on some, but not all, of the counts in a multi-count indictment, "the jury may return a verdict with respect to a count as to which it has agreed, and any count as to which the jury cannot agree may be tried again." Md. Rule 4-327(d). In that situation, "the trial judge should generally take steps to determine that genuine deadlock exists as to those counts [on which the jury has not agreed]." *Fennell*, 431 Md. 523. In addressing this issue, the trial court "'must neither pressure the jury to reconsider what it had actually decided nor force the jury to turn a tentative decision into a final one.'" *Id.* at 523-24 (quoting *United States v. Heriot*, 496 F.3d 601, 608 (6th Cir. 2007)). In other words, "a trial judge must guard against the danger of transforming a provisional decision into a final verdict." *Caldwell v.*

State, 164 Md. Ap. 612, 643 (2005). "Just as when the total circumstances disclose an ambiguity or qualification in a verdict, when they suggest that the jury has made a tentative decision, the court … should inquire into the jury's intention *vel non* that the verdict be final, if such inquiry can be done non-coercively; return the jury for further deliberation; or, if that is not possible and there is manifest necessity, declare a mistrial." *Id.*

We hold that the trial court in the present case did not err. When, at the conclusion of the second day of trial, the jury informed the court that it had not come to a consensus on two of the counts, the jury gave no indication that it was "genuinely deadlocked" on the two counts, only that it wished to be excused for the evening. When the jury reconvened the following morning to resume its deliberations, the court told the jury that if it continued deliberating up to the lunch break, the court would "see what's up." The court made clear that there was "no rush" and that the jurors should "take your time." After deliberating for less than an hour, the jurors informed the court once again that they could not reach a consensus on two of the counts. Although, in that instance, the jurors provided greater detail regarding the status of the impasse, noting that they had "discussed the counts extensively" and that they were "firm in their opinion," the jurors again gave no indication that they were "genuinely deadlocked" or that continued deliberations would be futile. To the contrary, the jury's note indicated that further deliberations might be beneficial given that the jury's consensus on only two of the counts was, according to the court, somewhat confusing in light of the facts of the case.

Moreover, the court, in sending the jury back to deliberate further, did not say or do anything that could reasonably be considered as coercive. In fact, further inquiry by the court into the nature of the impasse regarding the two counts, might very well have pressured the jury to reconsider its decision on the other two counts or turned the jury's tentative decision into a final one. The court's handling of the matter ultimately proved prescient, as the jury needed only another hour to turn an "even split" on two of the counts into a unanimous verdict on all counts. Accordingly, the trial court did not abuse its discretion in refusing to take a partial verdict and in instructing the jury to continue deliberations.

THE JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY IS AFFIRMED. COSTS TO BE PAID BY APPELLANT.